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Attorneys for Defendants

COUNTRYWIDE BANK FSB (now known as Bank of America, N.A.), THE BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATE HOLDERS CWALT, INC. ALTERNATIVE LOAN TRUST 2006-17T1, MORTGAGE PASS THROUGH CERTIFICATES, SERIES 2006-17T1 (erroneously named as "CWALT Alternative Loan Trust 2006-17T1 Countrywide Home Loans, a.k.a. Bank of America"), and BANK OF AMERICA (erroneously sued as successor to COUNTRYWIDE HOME LOANS, INC.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JOSE A. ALEXANDER JR., and
VELDA P. ALEXANDER

Case No. 3:12-cv-00417-BTM-MDD
(Assigned to Hon. Barry Ted Moskowitz)

Plaintiffs.

V.

COUNTRYWIDE BANK FSB, a federal savings bank, CWALT Alternative Loan Trust 2006-17T1 Countrywide Home Loans, a.k.a. Bank of America, a business entity form unknown, BANK OF AMERICA (as successor to COUNTRYWIDE HOME LOANS, INC.), and DOES 1 through 40, inclusive.

Defendants.

**REPLY TO PLAINTIFFS'
OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS**

[F.R.C.P. 12(b)(6)]

Date: November 2, 2012
Time: 11:00 a.m.
Ctrm: 15 - 5th Floor

SAC Filed: August 29, 2012
Trial Date: None

1 Defendants Countrywide Bank FSB (now known as Bank of America, N.A.)
 2 (**BANA**), The Bank of New York Mellon f/k/a The Bank of New York, as Trustee for
 3 the Certificate Holders CWALT, Inc. Alternative Loan Trust 2006-17T1, Mortgage
 4 Pass-Through Certificates, Series 2006-17T1 (erroneously named herein as "CWALT
 5 Alternative Loan Trust 2006-17T1 Countrywide Home Loans, a.k.a. Bank of
 6 America") (**BNYM**), and Bank of America (erroneously sued as successor to
 7 Countrywide Home Loans, Inc.) (collectively **defendants**) hereby submit their reply to
 8 plaintiffs' opposition to defendants' motion to dismiss.

9 Dated: October 24, 2012

Respectfully submitted,

AKERMAN SENTERFITT LLP

11 By: /s/ Justin D. Balser

12 Justin D. Balser
 13 Attorneys for Defendants
 14 COUNTRYWIDE BANK FSB (now
 15 known as BANK OF AMERICA, N.A.),
 16 The Bank of New York Mellon f/k/a The
 17 Bank of New York, as Trustee for the
 18 Certificate Holders CWALT, Inc.
 19 Alternative Loan Trust 2006-17T1,
 20 Mortgage Pass-Through Certificates,
 21 Series 2006-17T1 (erroneously named
 22 herein as "CWALT Alternative Loan
 23 Trust 2006-17T1 Countrywide Home
 24 Loans, a.k.a. Bank of America"), and
 25 BANK OF AMERICA (erroneously sued
 26 as successor to COUNTRYWIDE HOME
 27 LOANS, INC.).

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs Jose and Velda Alexander (**plaintiffs**) challenge the pending sale of the property at issue, despite their admitted default under the loan agreement and failure to bring the loan current. Plaintiffs, however, cannot maintain any claims against the moving defendants.

Plaintiffs' claims are clearly barred both by their failure to tender and by the statute of limitations. This Court noted in granting the motion to dismiss the first amended complaint that plaintiffs' claims were brought outside the statute of limitations. This Court was explicit in its August 13, 2012 order that plaintiffs had "one more opportunity" to amend their complaint. Despite that, plaintiffs add nothing new in the SAC demonstrating the ability to state a valid claim or demonstrating equitable tolling. Plaintiffs' claims are also deficiently vague and lacking the required specificity.

Defendants respectfully request the Court grant their motion to dismiss Plaintiffs' SAC without leave to amend.

II. ARGUMENT

A. The Statute of Limitations Bars the Action.

Plaintiffs' opposition argues at length that because they were promised a loan modification and not granted one, their action survives the statute of limitations bar. (Opposition to Motion to Dismiss (**OPP**), p. 3.) However, their own SAC admits that they were denied a loan modification in 2008, *over three years* before they filed their lawsuit. (SAC, ¶ 21.) This does nothing to remedy the fact that the statute of limitations has run.

Contrary to plaintiffs' belief, equitable tolling is not appropriate here. Even if it were, plaintiffs fail to plead facts supporting equitable tolling. The Court already rejected plaintiffs' argument for equitable tolling in its August 13, 2012 order, stating

1 that plaintiffs did not "plead any facts explaining why they could not have discovered
 2 the alleged fraud earlier" and noting "Plaintiffs could have examined the loan
 3 documents and compared them to the requirements under state and federal law at any
 4 time." (Order, p. 5.) Plaintiffs do nothing to explain why they failed to exercise any
 5 diligence, much less the reasonable diligence required by the law. No matter how
 6 much plaintiffs use bold, underlined, and italicized font, it does not change the fact that
 7 they have alleged no facts supporting equitable tolling and provide no factual support
 8 for their claim that defendants somehow concealed the information from them.
 9 Plaintiffs complain that they "were simply told to sign tens of documents" but "it is
 10 generally unreasonable...to neglect to read a written agreement before signing.
 11 *Rosenthal v. Great W. Fin. Sec. Corp.*, 14 Cal.4th 394, 424 (1996) (dismissing with
 12 prejudice a claims for intentional misrepresentation where plaintiffs alleged their claim
 13 was tolled because they did not discover the alleged fraudulent statements in loan
 14 documents until well after they signed the documents.).

15 Plaintiffs fail to establish a basis for equitable tolling because their failure to
 16 discover the alleged violations is exactly that; their failure.

17 **B. Plaintiffs Still Fail to Establish Wrongdoing Attributable to BANA
 18 With Regard to the First Loan.**

19 Plaintiffs claim they cannot tell who they should sue. (OPP, pp. 3-4.) They fail
 20 to explain how they decided to attempt to hold BANA responsible for the actions of
 21 Countrywide Home Loans, Inc. Bank of America is not the successor in interest to
 22 Countrywide Home Loans, Inc. Plaintiffs do not sue Countrywide Home Loans, Inc.
 23 They are simply mistaken and refuse to acknowledge their ignorance. It is not BANA's
 24 responsibility to prove it is not the successor in interest, rather, it is plaintiffs' burden to
 25 plead sufficient facts to establish liability. In fact, plaintiffs' opposition fails to even
 26 explain how they came to believe BANA was successor in interest. Instead, it simply
 27 discusses MERS as nominee beneficiary and BNYM as the assignee, then goes on to
 28

1 say that "accordingly" plaintiffs believe BANA is the actual beneficiary. It makes no
 2 sense whatsoever.

3 **C. Plaintiffs Must Tender.**

4 Plaintiffs claim they do not need to tender because they have alleged no cause of
 5 action which requires tender. Plaintiffs apparently misunderstand California's tender
 6 rule. When a plaintiff seeks relief in equity he must first do equity. *See Arnolds Mgmt.*
 7 *Corp. v. Eischen*, 158 Cal.App.3d 575, 578-79 (1984); 4 Miller & Starr, *California*
 8 *Real Estate* (2d ed. 1989) § 9:154 at 507-08. The "tender rule" applies not only to the
 9 plaintiff's request to set aside or challenge a foreclosure, but also to any causes of
 10 action that derive from the wrongful foreclosure allegations or seek redress from
 11 foreclosure. *Arnolds*, 158 Cal.App.3d at 578-80. Any cause of action implicitly
 12 integrated with allegations of an irregular sale thus fails unless the trustor can allege
 13 and establish a valid tender. *Id.* at 579. The relief sought, and not the title of the cause
 14 of action, invokes the tender rule. In plaintiffs' SAC they request "a declaration that the
 15 assignment of Deed of Trust was ineffective as to each and every defendant" and
 16 "[r]eturn of any money or property given by the Plaintiffs to anyone...in connection
 17 with the transaction...." These are equitable remedies, subjecting the action to the
 18 tender rule.

19 **D. Plaintiffs' Fraud Claim is Insufficiently Pled.**

20 In support of their bare bones fraud claim, plaintiffs cite an 1891 case stating that
 21 fraud only has to be set out in substance and legal effect. (OPP, p. 5.) However, it is
 22 clear that they advance an outdated and inapplicable standard for pleading fraud.
 23 Moreover, the case cited does not seem to say what plaintiffs' claim it says. It appears
 24 from the opinion that the complaint in that case had very specific averments of fraud,
 25 and that even so, "[i]f the action were based upon the fraudulent representations alone,
 26 the complaint would be insufficient...." *Hick v. Thomas*, 90 Cal. 289 (1891). Plaintiffs
 27 claim the *Hicks* Court's holding was that "[f]raud allegations need only be set out in
 28 substance and legal effect, not in minute detail." (OPP, p. 5.) But what the *Hicks* Court

1 actually said was "[t]he acts of fraud must be specifically set out. But this rule does not
 2 require or justify a minute detail of all the conversations by which fraudulent
 3 representations are proven. It is enough if averred in substance and legal effect as
 4 proven." *Id.* at 295 (emphasis added). Allegations relating to the details of the
 5 conversations supporting a claim of fraud need not be set out word for word but they
 6 still must be specific. What is unclear clear is how plaintiffs' counsel thinks he may
 7 attempt to propound a false pleading standard and misrepresent the holding of the state
 8 court case he cites without courting sanctions. When asserting a cause of action for
 9 fraud, generalities and conclusions do not suffice. *Small v. Fritz Companies, Inc.*, 30
 10 Cal.4th 167, 184 (2003). “[T]he circumstances constituting fraud or mistake shall be
 11 stated with particularity.” Federal Rule of Civil Procedure 9(b). Allegations of fraud
 12 must be accompanied by “the who, what, when, where, and how” of the misconduct
 13 charged. *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997) (internal quotation
 14 marks omitted). Furthermore, when bringing an action for fraud against a corporation,
 15 a plaintiff must also specifically allege the names of the persons who made fraudulent
 16 statements, their authority to speak, to whom they spoke, what they said or wrote, and
 17 when it was said or written. *See Tarmann v. State Farm Mutual Automobile Ins. Co.*, 2
 18 Cal.App.4th 153, 157 (1991).

19 Plaintiffs' opposition claims the fraud claim is sufficiently pled because it
 20 implies that the statements were provided to them by their lender on the date of closing.
 21 Their "lender", according to the SAC, is "Countrywide". (SAC, ¶ 20.) Nowhere does
 22 the SAC specify the names of the persons making the statements or their authority to
 23 speak. It is clearly and unbelievably deficient and yet plaintiffs have refused to correct
 24 the issue.

25 Plaintiffs go on to apparently admit that they have not sufficiently pled fraud.
 26 (OPP, p. 6-7.) Plaintiff then opines, without authority, that "[m]any courts have
 27 addressed similar situations and recognize an exception to the particularized pleading
 28 requirement." (OPP, p. 7.) Plaintiffs seem to ask the Court to allow their deficient

1 pleading to slide, so that they can conduct a discovery fishing expedition. However, it
 2 is apparent from plaintiffs' allegations that all their fraud claims are based on facts that
 3 they could have discovered at any time through review of the loan documents.
 4 Plaintiffs fail to explain how the facts they need to properly plead fraud are in the
 5 peculiar control of the defendants. Nor do they plead any facts in their SAC supporting
 6 such a contention.

7 Notably, plaintiffs utterly fail to address the fact that their pleadings contain no
 8 allegation whatsoever that any defendant knew the alleged intentional
 9 misrepresentations were false. This is a necessary element to intentional
 10 misrepresentation.

11 Plaintiffs also fail to address the fact that they cannot establish reliance and
 12 damages. Any contention they would have abandoned the loan is ludicrous, as they
 13 discovered they would not receive a loan modification in 2008 and yet continued to
 14 enjoy the loan and its benefits until they defaulted and foreclosure was imminent. Then
 15 suddenly the loan is untenable and they want rescission.

16 **E. Plaintiffs' UCL Claim Fails**

17 Plaintiffs' defense of their UCL claim is unavailing. They apparently concede
 18 that if their negligent misrepresentation (fraud) and intentional misrepresentation
 19 claims fail, their UCL claim fails as well. (OPP, p. 8-9.) Plaintiffs inexplicably state
 20 "[p]laintiffs have alleged that they entered a consumer credit transaction with BNYM;
 21 that BNYM negotiated the loan with Plaintiffs in which the documents provide for
 22 terms other than those represented by Defendant to Plaintiffs and BNYM engaged in
 23 self-dealign at the expense of Plaintiffs." (OPP, p. 9.) BNYM did not negotiate the
 24 loan or provide any documents. It is merely the trustee for the trust holding the
 25 securitized mortgage and note. Once again plaintiffs' arguments make no sense.

26 Nor do plaintiffs address a fatal flaw with their claim: they did not suffer an
 27 injury in fact. Plaintiffs also do not allege in their SAC how they have lost money or
 28 property as a result of any actions of defendants, thereby failing to satisfy section

1 17204. Their SAC states their damages include "all fees and payments made pursuant
 2 to this fraudulent loan" but there is no explanation regarding how these fees and
 3 payments are injuries based on the alleged UCL violations. Clearly, any loan includes
 4 payments and fees and any loan plaintiffs would have otherwise secured would have
 5 included such costs. In their opposition, plaintiffs claim they paid "unjustified fees and
 6 interest" due to the unfair practices, but this claim is nowhere to be found in their actual
 7 SAC.

8 **F. Plaintiffs Are Not Entitled to an Accounting**

9 Plaintiffs are not entitled to an accounting. Plaintiffs have access to all of the
 10 information relating to their loan payment terms and the amounts they have paid, which
 11 eliminates the need for an accounting. Plaintiffs fail to state an actionable claim, and
 12 therefore are not entitled to an accounting as a legal remedy. Plaintiffs fail to plead that
 13 the alleged balance due to them can only be ascertained by an accounting. Further, the
 14 right to an accounting is not a cause of action, but a remedy. *See Batt v. City and*
 15 *County of San Francisco*, 155 Cal.App.4th 65, 82 (2007) ("[an accounting is] not an
 16 independent cause of action but merely a type of remedy") (internal quotations
 17 omitted); *Duggall v. G.E. Capital Comm. Servs., Inc.*, 81 Cal.App.4th 81, 95 (2000).
 18 Thus, "[a] right to an accounting is derivative; it must be based on other claims." *Janis*
 19 *v. Cal. State Lottery Com.*, 68 Cal.App.4th 824, 833-834 (1998). Plaintiffs are not
 20 entitled to an accounting because none of their underlying claims has any merit. For
 21 these reasons, Plaintiffs' accounting claim fails.

22 **G. Plaintiffs Fail to Address the Court's Prior Order or the Motion to**
 23 **Dismiss.**

24 Plaintiffs' claim for equitable tolling is unchanged from their first amended
 25 complaint. Therefore, the Court must reach the same conclusion: that the claims are
 26 barred by the statute of limitations. Plaintiffs have not corrected their lack of
 27 specificity from previous versions of the complaint. They fail to allege knowledge
 28 with regard to the intentional misrepresentation claim. They also fail to address the

lack of reliance and damages with regard to all claims. More importantly, despite plaintiffs' addition of some language directly from this Court's order, plaintiffs do not address the fundamental problems with their pleadings which led to the Court's dismissal of the first amended complaint. Their sloppy pleading leads to a confusion of Countrywide Bank and Countrywide Home Loans, Inc. The Court stated that plaintiffs had not alleged facts to establish BANA's liability for the actions of Countrywide Home Loans, Inc. and they have not done so in the SAC either. (Order, p. 3.) Plaintiffs have now had three opportunities to properly plead a cause of action, and have failed to do so at every turn. The Court should dismiss with prejudice.

III. CONCLUSION

Plaintiffs' SAC is substantially indistinguishable from their previous complaint and FAC and fails for the same reasons. Plaintiffs' claims are barred by their inability to tender and by the applicable statutes of limitations. This SAC was plaintiffs' "one more opportunity" to state a claim and they fail to do so. They should not be given a fourth bite at the apple.

Defendants respectfully request the Court grant their motion to dismiss plaintiffs' SAC without leave to amend.

Dated: October 24, 2012

Respectfully submitted,

AKERMAN SENTERFITT LLP

By: /s/ Justin D. Balser

Justin D. Balser
Attorneys for Defendants
COUNTRYWIDE BANK FSB (now
known as BANK OF AMERICA, N.A.)
and The Bank of New York Mellon f/k/a
The Bank of New York, as Trustee for the
Certificate Holders CWALT, Inc.
Alternative Loan Trust 2006-17T1,
Mortgage Pass-Through Certificates,
Series 2006-17T1 (erroneously named
herein as "CWALT Alternative Loan
Trust 2006-17T1 Countrywide Home
Loans, a.k.a. Bank of America")

PROOF OF SERVICE

I am employed in the City and County of Denver, State of Colorado. I am over the age of 18 and not a party to the within action. My business address is 1400 Wewatta Street, Suite 500, Denver, Colorado 80202.

On October 24, 2012, I served the following documents by placing a true copy thereof in a sealed envelope(s) on the persons below as follows:

**REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS**

Steve W. Haskins
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- (CM/ECF Electronic Filing) I caused the above document(s) to be transmitted to the office(s) of the addressee(s) listed above by electronic mail at the e-mail address(es) set forth above pursuant to Fed.R.Civ.P.5(d)(1). "A Notice of Electronic Filing (NEF) is generated automatically by the ECF system upon completion of an electronic filing. The NEF, when e-mailed to the e-mail address of record in the case, shall constitute the proof of service as required by Fed.R.Civ.P.5(d)(1). A copy of the NEF shall be attached to any document served in the traditional manner upon any party appearing pro se."

I declare under penalty of perjury that I am employed in the office of a member of the bar of this Court at whose direction this service was made and that the foregoing is true and correct.

- (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

(Federal) I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Executed on October 24, 2012, at Denver, Colorado.

Steven Kolby
(Type or print name)

Steven Holtby
(Signature)